(26,622)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 536.

KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 30, 1918.

1 I. *Petition.*

Filed December 19, 1912.

In the Court of Claims of the United States.

No. 31973.

KANSAS CITY SOUTHERN RAILWAY COMPANY

vs.

UNITED STATES.

Petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Kansas City Southern Railway Company, respectfully represents:

I.

That petitioner is a corporation duly organized and existing under the laws of the State of Missouri, and owns and operates, and at the times hereinafter stated did own and operate, a line of rail-
2 way extending from Kansas City, Missouri, to Port Arthur, Texas, over which said line petitioner is now, and at the times hereinafter stated was, transporting the United States mails.

II.

That for many years petitioner has transported the mails over its road between De Quincy and Lake Charles, Louisiana; Siloam Springs and Texarkana, Arkansas, and Kansas City, Missouri, and Siloam Springs, Arkansas, which said portions of its road have been and still are designated by the Post-Office Department as mail routes numbers 149,027, 153,011, and 155,054, respectively.

That in or about the month of June, 1906, petitioner entered into contracts with said Department, agreeing to transport the mails over said routes "upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

That said agreements contained no reference whatsoever to the time schedule according to which petitioner's trains were operated nor any undertaking, express or implied, that petitioner would transport the mails, according to the time of arrival and departure of petitioner's trains as set forth in said schedule.

That furthermore there was no provision of said contracts whereby the Post-Office Department was authorized to deduct from the
3 compensation thereby agreed to be paid to petitioner any sum or sums for failure to perform service, owing to a lack of mails to be transported.

III.

That the act of Congress of June 26, 1906 (34 Stat. L., 467), providing for the expense of the postal service for the fiscal year ending June 30, 1907, provided (pp. 472-473):

"That the Postmaster-General shall require all railroads carrying " the mails under contract to comply with the terms of said contract, " as to time of arrival and departure of said mails, and it shall be " his duty to impose and collect reasonable fines for delay, when " such delay is not caused by unavoidable accidents or conditions."

That the above provision of said act by express terms applied only to contracts for transportation of the mails wherein the time of arrival and departure of the mails was stipulated; that in point of fact such contracts do not now and never have contained such a stipulation, nor was there any such stipulation embodied in the contracts aforesaid, entered into by petitioner, for carrying the mails over routes numbers 149,027, 153,011, and 155,054.

IV.

That in view of this condition of affairs, the aforesaid pro-
4 vision of the act of June 26, 1906, was sought to be remedied by the following provision of the act of March 2, 1907 (34 Stat. L., 1205, 1212), providing for the expenses of the Post-Office Department for the fiscal year ending June 30, 1908:

"That the Postmaster-General shall require all railroads carrying the mails to maintain their regular train schedules as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such delay is not caused by unavoidable accidents or conditions."

That while the above-mentioned act of March 2, 1907, was before Congress in the form of a bill that body was informed that the above-quoted provision of the act of June 26, 1906, was inoperative and void, because the contracts with railroad companies for transporting the mails contained no provision fixing the exact time of arrival and departure of their mail trains, and it was in the light of this information that the aforesaid change was incorporated in the act of March 2, 1907.

V.

That notwithstanding the premises aforementioned the Post-Office Department unlawfully withheld from your petitioner, during the fiscal year ending June 30, 1907, the sum of three thousand

5 three hundred and fifty-five dollars and forty-eight cents, as a penalty imposed on account of late arrivals of petitioner's trains and failure to perform service on the above-mentioned mail routes, distributed as follows:

Route No.	Amount of fine.
149,027	$16.94
153,011	2,547.32
155,054	791.22
Total	$3,355.48

That the said sum of money shown to be due your petitioner is justly due and owing to it by the United States, the same having been and still being unlawfully withheld from your petitioner by the United States and its postal authorities in the manner and for the reasons herein previously set forth, and that there exists in favor of the United States and against your petitioner no debt, claim, or set-off by which the said amount herein prayed for may be or should be reduced or retained.

Your petitioner prays, therefore, that this honorable court will render a judgment in its favor against the United States in the full sum of three thousand three hundred and fifty-five dollars and forty-eight cents ($3,355.48), the same being due and wholly unpaid.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
By J. F. HOLDEN, *Vice-President.*

6 STATE OF MISSOURI,
County of Jackson, ss:

Before me, Clarence R. Hall, a notary public in and for the State and county aforesaid, appeared J. F. Holden, known to me to be the vice-president of the Kansas City Southern Railway Company, and made oath before me that the allegations of said petition are true to the best of his knowledge, information and belief.

J. F. HOLDEN.

Subscribed and sworn to before me this 9th day of December, A. D. 1912.

[NOTARIAL SEAL.] CLARENCE R. HALL,
Notary Public, Jackson County, Missouri.

My commission expires October 14, 1916.

BRITTON & GRAY,
Attorneys for Claimant.

S. W. MOORE,
General Solicitor.

7 II. *General Traverse.*

Court of Claims.

No. 31973.

KANSAS CITY SOUTHERN RAILWAY COMPANY

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

8 III. *Argument and Submission of Case.*

On January 28, 1918, the case was argued and submitted on merits by Mr. Alexander Britton, for the claimant, and Messrs. Charles H. Bradley, Joseph Stewart and J. R. Anderson, for the defendants.

IV. *Findings of Fact and Conclusion of Law.*

Filed March 4, 1918.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

Claimant is a corporation organized under the laws of the State of Missouri. During the times hereinafter stated it operated trains and transported the mails over and upon the several railroad mail routes hereinafter mentioned.

II.

As the quadrennial term for which readjustment had been made on routes Nos. 149027, DeQuincy to Lake Charles, Louisiana; 153011, Siloam Springs, Arkansas, to Port Arthur, Texas; and 155054, Kansas City, Missouri, to Siloam Springs, Arkansas, would expire by limitation June 30, 1906, the Postmaster General, on February 13, 1906, in accordance with established practice, sent to the claimant distance circulars for the three named routes, which claimant was requested to fill out with certain specific information called

for thereon and to return the completed circulars to the department. As transmitted to the claimant the forms contained an agreement clause to be executed by a principal officer of the company as
9 follows:

The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service.

These circulars, properly filled and signed as to the agreement clause, were returned by the claimant to the department.

The Postmaster General caused the mails to be weighed on said railroad mail routes as provided by law, and thereafter issued orders, dated September 25, 1906, on route 149027, September 26, 1906, on route 153011, and September 10, 1906, on route 155054, stating the amounts and rates of compensation for the service as provided for by law for the new term from July 1, 1906, to June 30, 1910, and gave the claimant notice thereof on the same dates respectively. Each contained the following:

This adjustment is subject to future orders, and to fines and deductions, and is based on service of not less than six round trips per week.

Said notices to the claimant company contained the following:

This adjustment is subject to future orders, and to fines and deductions, and is based on service of not less than six round trips per week.

III.

At the time the agreements hereinbefore mentioned were made the following laws and regulations were in effect:

The Postmaster General is authorized and directed to readjust the compensation * * * to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for * * * (railway postal clerks) to accompany and distribute the mails.

10 The Postmaster General may make deductions from the pay of contractors for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

Railroad companies must furnish quarterly, to the division superintendent of Railway Mail Service, statements on the form prescribed by the Post Office Department, and affirmed under oath of their respective principal transportation officers, showing by routes all failures of trains carrying the mail; also, when called upon to do so, railroad companies will be required to furnish monthly statements, certified as above, of all delays, and their causes, to trains which the department regards as being of special importance as mail trains.

Deductions will be made within the limit fixed by law (sec. 1332), the amount thereof to depend upon the nature or frequency of the failure and the importance of the mail.

Railroad Service.

2. The compensation for service on each route shall be apportioned, as nearly as practicable, among the several trains carrying mail, according to the average weight of mail carried by each train.

3. Deductions will be made for failure to perform any trip, or a part thereof, on the basis of the mileage and the average weight of the mail carried by the train.

* * * * * * *

12. Trains which the department regards as being of special importance as mail trains will be subject to deductions for failure to arrive at junction and terminal points at the time fixed by schedule unless held for mail connections, or unless satisfactory explanation be given in due time.

13. Applications from railroad companies for remission of
11 deductions made from their compensation for carrying mail
will not be considered unless filed in the office of the Second Assistant Postmaster General within six months from the date of notice by the Post Office Department to the railroad company that such deduction has been ordered.

* * * * * * *

The specific requirements of the service as to due frequency and speed, space required on trains or at stations, fixtures, furniture, etc., will at all times be determined by the Post Office Department and made known through the General Superintendent of Railway Mail Service.

Thereafter the Second Assistant Postmaster General, under date of October 2, 1905, issued the following order:

On account of the inferior service resulting from failures to observe the schedule on routes, or parts of routes, on which railroad mail service is not more frequent than seven times a week each way, it is ordered that in certifying to the performance of the service on such routes for, and subsequent to, the quarter ended December 31, 1905, deductions be made at the rate of twenty (20) per cent of the value of each train that arrives at the termini or junction points fifteen (15), or more minutes late and the aggregate number of late arrivals if ten (10) or more, without satisfactory excuse, in any one quarter, except that no deduction of less than one dollar ($1) will be made.

Thereafter Congress, by act of June 26, 1906 (34 Stat. L., ch. 3546, pp. 467, 472, 473), provided as follows:

That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as

to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such
12 delay is not caused by unavoidable accidents or conditions.

Thereafter the Postmaster General on August 3, 1906, issued order No. 1131, as follows:

The act making appropriations for the Postal Service for the fiscal year ending June 30, 1907, provides:

"That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such delay is not caused by unavoidable accidents or conditions."

It is therefore ordered, That every railroad company operating a route over which mails are carried shall, on the regular affidavit covering failures of mail-train service which it is required to submit promptly at the end of each quarter to the respective division superintendents, Railway Mail Service, show, in addition to and separate from such mail-train failures, the number of minutes late of each arrival (not time of arrival) of every train carrying mail which has reached the terminus of said route, the terminus of such train's run, or any intermediate point designated by the Postmaster General and of which the company shall have notice, 30 or more minutes late as many as ten times during the quarter, the extent, cause in detail, and place of each delay being given.

This order supersedes that of October 2, 1905.

IV.

On August 6, 1906, the Second Assistant Postmaster General sent to the General Superintendent of Railway Mail Service the following instructions:

In the matter of requiring railroad companies to observe their schedule as contemplated by the act making appropriations for the Postal Service for the fiscal year ending June 30, 1907 (see Postmaster General's Order 1131 of Aug. 3, 1906), you will please
13 have each company properly instructed by the division superintendents, Railway Mail Service, who need not for the present verify such portion of the regular affidavit as relates solely to the failures to observe schedule of arrival and departure.

The reports required by Postmaster General's Order 1131 supersede the detention statements forwarded under the order of October 2, 1905, providing for deductions on account of late arrivals on routes or parts of routes where the railroad-mail service was not more frequent than seven times a week each way.

As under the order of October 2, 1905, when a train is held for connections, it should be stated whether such connection is a mail train from which mails are received, what company operates it, and its number.

Detentions to freight trains carrying the mail need not be reported at present over such portions of a route as have in operation mail

service by passenger or mixed trains with a frequency of at least once a day each way.

The act referred to is effective July 1, 1906, and it is desired that, as far as practicable, the reports show detentions from that date.

On August 7, 1906, the General Superintendent of Railway Mail Service sent to the division superintendents of said service a copy of the above letter dated August 6, 1906, and directed such superintendents to instruct the various railroad companies in their divisions as directed by the Second Assistant Postmaster General.

On August 13, 1906, the division superintendent, seventh division, Railway Mail Service, sent to the general manager of the claimant a letter informing him that the Postmaster General had promulgated order 1131 and transmitted a copy of said order. After setting forth the order of the Postmaster General said letter proceeded as follows:

14 The reports required by the Postmaster General's order 1131 will supersede the detention statements forwarded under the order of October 2nd, 1905, providing for deductions on account of late arrivals on routes or parts of routes where the railroad mail service is not more frequent than seven times a week each way.

As under the order of October 2, 1905, when a train is held for connections it should be stated whether such connection is a mail train from which mails are received, what company operates it, and its number.

Detentions to freight trains carrying the mails need not be reported at present over such portions of a route as have in operation mail service by messenger or mixed trains with frequency of at least once a day each way.

The act referred to is effective July 1, 1906, and it is desired that, as far as practicable, the reports show detentions from that date.

On December 29, 1906, the division superintendent, Eleventh Division, Railway Mail Service, wrote claimant company with reference to order 1131, after quoting which he instructed the claimant as follows:

In making reports of delays to trains, as called for in the above order, please conform to the following requirements:

"1. The extent (not the time of arrival) of each late arrival at the terminus of the route, any intermediate point designated by the Postmaster General, or (in the event the terminus of the route and that of the train's run are not identical), at the terminus of the train's run, should be shown.

"2. Where delays are due to wrecks, derailments, breakage of machinery, and other causes of like nature, full explanation should be given of the causes of the same, as shown on the company's records.

"3. Where delays are due to waiting for 'connections,' it should be stated whether or not such connection is a mail train from which mails are received, what company operates such train, its number, etc.

15 "4. Where delays are due to slow track, soft track, or slippery rails, the cause should be given in detail.

"5. Where heavy wind is given as the cause of delay, the velocity of the wind should be shown.

"6. The extent of the delay due to each cause should be shown separately.

"The explanation that delays are due to switching or handling freight is not considered satisfactory.

"The following excuses for late arrivals will be regarded as satisfactory:

"Waiting for mail connection, when shown as indicated in paragraph 3 hereof.

"Breakage of machinery, hot boxes, and trains breaking in two, after proper inspection; but the result of the inspection should be shown.

"Repairs or damage to bridges.

"Wrecks, slow track, soft track, and slippery rails, when satisfactorily explained.

"Providential causes, such as washouts, snow blockades, and landslides, and

"Certain other delays which are not due to, in the opinion of the department, carelessness, negligence, or lack of proper skill on the part of railroad employees.

"Payments to railroad companies for services performed are apt to be delayed unless these affidavits, in proper form, are forwarded to the department promptly."

Detentions to freight trains carrying mails need not be reported for the present, over any route or part of same, where there is also mail service by passenger or mixed train with a frequency of at least once a day.

No report of late arrivals need be made for any train, where such train does not arrive at terminal of route, or of train, or some intermediate point or points designated by the department, thirty minutes or more late, for as many as ten times during the quarter. Where none of the trains on any route arrive thirty or more minutes late as many as ten times during the quarter the statement, "No late arrivals to report" will be satisfactory.

16 Each affidavit, however, should first show the failures of train service, if any, and if not, "No failures." It should then either show the late arrivals, or if there are none to report, be indorsed, "No late arrivals to report."

Said letters were received by claimant's general manager in due course of mails.

On December 23, 1906, the Chief of the Division of Inspection, Post Office Department, submitted to the Second Assistant Postmaster General the following memorandum, which was approved by him and the deductions recommended were authorized by the Postmaster General December 28, 1906:

In compliance with your instructions, and in order that intelligent consideration may be given to the question of the rate at which deductions shall be made from the pay of railroad companies under Postmaster General's order No. 1131, of August 3, 1906, because of

delays to mail trains, I have the honor to submit herewith a statement showing, as far as practicable at this time, the effect, so far as amounts are concerned, of deductions at the rate of 20 per cent and 10 per cent of the compensation of all mail trains which have failed to reach the termini of their routes, or runs if less than a route, within 30 minutes of the schedule as many as 10 times without satisfactory excuse in the quarter ended September 30, 1906, and which will be dealt with in making our settlement for the December quarter, which is about to take place.

There are at present 3,146 railroad routes in operation—consequently that many detention affidavits due. We have received and examined 2,256, of which 1,716 will be filed without further action and 540 cases made on the remainder. Of the 890 affidavits still to be received and examined, it is assumed that the percentage of cases made will be very much larger than that made on the affidavits already in and examined. This opinion is based upon the fact that the delay in sending them to the department is due in part
17 to the large number of failures to maintain schedule which
have taken place on the routes in question and upon the further fact that the affidavits on a good many of the largest routes are yet due.

The accompanying lists (one from each of our railroad desks) show in detail the number of routes in each State, detention affidavits received, those filed "clear," the number of cases made, the total quarterly pay of the routes on which the affidavits received indicate that deductions will be necessary on account of failures to maintain schedule, the total deduction at 20 per cent, at 10 per cent, and the per cent those amounts are of the quarterly compensation earned by the routes involved.

From these tables it appears that if a deduction of 20 per cent of the value of the trains that have failed to comply with the schedule is made, it would amount to 2.43 per cent of the companies' entire compensation for the quarter. By entire compensation we mean the payment for the trains which were on time or late from a satisfactory excuse, as well as for those that were late from a bad excuse; deductions at 10 per cent would amount to 1.22 per cent of the entire compensation.

In considering this question, it should be borne in mind that owing to the late date, August 3, on which the order covering the call for the information desired in detention statements was issued, many of them are necessarily incomplete, and in some cases, notably that of Long Island Railroad Company, comprising 13 routes, it has not been possible to secure anything in the way of a statement of detentions. In each case of this character, a nominal fine of $10 will be imposed upon the route with the understanding that the company will furnish all necessary information for each quarter subsequent to that ending September 30, 1906.

The total quarterly compensation on routes on which the affidavits received indicate that deductions will be necessary in the

18 December quarter settlement is $4,038,772.45, and the deduction at 20 per cent amounts to $98,509.77; at 10 per cent, $49,254.88.

During the September quarter railroad service should be better throughout the country than at any other time in the year on account of favorable weather conditions and that, in addition to the fact that the deductions to be made on routes for which the detention affidavits have not yet been received and examined will undoubtedly be larger than those that have already been passed upon, should have due consideration at this time. It is probable that we will be able to give practically full returns, except that, as heretofore mentioned, a number of the affidavits may be incomplete by February 1, 1906.

Under the order of October 2, 1905, providing for deductions on routes on which the service was not more frequent than once a day each way for failures to observe schedules, the rate of deduction was fixed at 20 per cent of the compensation of the delayed trains, the margin being 15 minutes instead of 30 as under the present rule.

A large number of our cases for the December quarter are now ready to close, but will necessarily be held awaiting your decision as to the rate or percentage at which the deductions shall be made. Deductions at the rate of 20 per cent would not seem to be unreasonable.

V.

For the quarter ended September 30, 1906, the claimant company rendered its statement of failures on mail route 153011 as follows:

The Kansas City Southern Railway Company.

Statement of Failures on Route No. 153,011, *Between Siloam Springs, Arkansas, and Port Arthur, Texas, for the Quarter Ending September* 30, 1906.

Date of failure.	Train No.	Points between which failure occurred.	Cause of failure. (Describe the failure and state disposition made of mail.)
......	......	(No failures)	......

19 *Mail Trains Arriving at End of Route 30 Minutes or More Late.*

Date.		Delays. Hrs.	Min.	Cause of delay.
				Arriving at Port Arthur Train #1.
July	4.	3	55	Derailment of engine 375 at Horatio; broken axle on engine 335, mile 701.
	5.	4	10	Derailment of train extra, engine 375, at Horatio; derailment of train No. 52, mile 561.
	14.	1	15	Blocked by switch engine at Shreveport; soft track between Shreveport and Forbing; engine died at De Quincy, a/c water in fuel oil.
	19.	3	35	Derailment of train No. 37, mile 570.
	22.	..	40	Meeting delayed freight train; soft track between De Quincy and Beaumont.
	24.	..	55	Changing engines at Kansas City; hot driving box at Lanagan, Mo.; losing key out of driving box, Gentry, Ark.
Aug.	4.	3	35	Engine 102 broke down at Frierson; engine 337 running hot between Frierson and Zwolle; engine 251 running hot between De Quincy and Beaumont.
	5.	..	50	Heavy transfer to Lake Charles branch at De Quincy; heavy express and baggage at Beaumont.
	9.	4	30	Derailment on mile 359.
	10.	1	55	Soft track between Asbury and Neosho; set out extra car at Joplin; hot box on engine 502 at Sulphur Springs; hot box on express car at Stillwell.
	16.	1	10	Repairing drawbar on combination car at Ruliff; trouble with drawbar between Beaumont and Port Arthur.
	18.	..	30	Heavy express and baggage between Pittsburg and Siloam Springs; soft track between De Quincy and Beaumont.
	20.	..	30	Heavy express and baggage, and meet train, Beaumont.
	21.	7	45	Engine 404 not steaming properly, and meeting trains, Grandview to Pittsburg; driver broken off engine 173, mile 358; baggage and express at Shreveport; repairing wedge on engine 109 at Hornbeck.

Mail Trains Arriving at End of Route 30 *Minutes or More Late.*—Continued.

Date.	Delays. Hrs.	Delays. Min.	Cause of delay.
Aug. 23.	..	30	Heavy baggage and express, and meet trains, Beaumont.
24.	..	35	Soft track between De Quincy and Beaumont; heavy baggage and express, and meet trains, Beaumont.
Sept. 8.	..	30	Derailment of train 1st 51 at Rust.
17.	6	20	Derailment, mile 290; sawing by freight trains at Hornbeck; heavy baggage at Leesville.
20.	1	30	Derailment of train #53, mile 68.
20			Train #3.
July 1,	4	5	Waiting for U. S. mail from post office at Shreveport; derailment of train extra, engine 377, mile 635.
2.	..	40	Gassing cars at Shreveport, unable to shut off gas.
3.	1	20	Train broke in two between Belt Junction and Grandview; heavy run of passengers, baggage, and express between Shreveport and De Quincy.
4.	7	20	Heavy travel between Mena and Shreveport; derailment train extra, engine 170, mile 757.
5.	2	10	Derailment train No. 51, mile 650.
6.	2	20	Derailment of train extra, engine 352, mile 514.
13.	1	5	Washout between Converse and Noble; meet #4 at Zwolle.
19.	1	50	Failure of air pump on engine 102; using hand brakes between De Ridder and De Quincy.
21.	1	30	Returned to Kansas City from Big Blue Junction for another engine a/c bursted flue; freight engine unable to make time between Kansas City and Pittsburg; repairing air pump on engine 102 at Shreveport.
22.	1	20	Meeting delayed train at Richards; engine 140 not steaming properly between Spiro and Thomasville; picking up extra coaches at Mena.
24.	5	20	Derailment of train #52 on mile 687.

Mail Trains Arriving at End of Route 30 *Minutes or More Late.*—Continued.

Date.		Delays. Hrs.	Min.	Cause of delay.
July	28.	2	..	Severe rainstorm and sawing by freight trains, Frierson; soft track between De Quincy and Beaumont; heavy baggage and express at Beaumont.
	29.	1	30	Detouring via. Frisco between Gulfton and Joplin, a/c derailment between those points.
	30.	..	40	Repairing piston of engine 103 at Frierson.
Aug.	2.	1	45	Derailment of engine in Texarkana yard.
	4.	1	45	Broken piston and cylinder head of engine 173, near Howard water tank; blocked in Mena yard by train #4.
	11.	..	30	Repairing coach at Shreveport; repairing engine 103 at Orangeville.
	22.	4	..	Delayed at Leesville a/c derailment of train extra, engine 354.
	27.	..	35	Broken union on engine 102, on mile 729.
	28.	1	10	Derailment of engine 110, mile 645.
	31.	1	15	Picking up extra cars at Shreveport; hot box on engine at Mansfield; could not make running time a/c nine-car train; Beaumont to Port Arthur.
Sept.	1.	..	45	Making repairs to baggage car at Shreveport.
	2.	1	20	Engine not steaming properly, Bloomburg to Rodessa; delayed for gas at Shreveport; could not make running time between Shreveport and De Quincy a/c eight-car train and light engine.
	3.	2	15	Derailing of train No. 54, mile 119.
	6.	1	5	Meeting delayed freight at Mooringsport; picking up extra car at Mansfield, and setting same out at Zwolle, heavy baggage and express at Leesville and Beaumont.
	7.	..	30	Could not make running time between Wilton and Shreveport a/c broken atomizer on engine 401.
	10.	..	35	Waiting for theatrical troup and baggage car from Southern Pacific at Beaumont.
	27.	2	10	Derailment of train extra, engine 335, near Rosepine.
	30.	1	30	Derailment of engine 370 at Bloomburg.

Mail Trains Arriving at End of Route 30 *Minutes or More Late.*—Continued.

Date.		Delays. Hrs.	Min.	Cause of delay.
				Train #4.
21				
July	1.	2	35	Derailment of train extra, engine 377, mile 635.
	2.	2	..	Derailment of train extra, engine 377, mile 635.
	4.	1	5	Hot box on baggage car at Thomasville; express and baggage at Howe; broke train line pipe and picked up Fort Smith sleeper at Howe; heavy train north of Spiro.
	6.	2	35	Derailment of train No. 51, mile 650; express and baggage, and picking up Fort Smith sleeper, Spiro.
	23.	3	5	Derailment of engine 142 on mile 556; express and baggage at Spiro.
	25.	7	15	Derailment of train #52, mile 687.
	28.	..	40	Express and baggage, and picking up car at Spiro; meet trains, Westville.
	30.	..	55	Engine 103 broke piston at Florien; pick up car at Spiro; express at Sallisaw; repairs engine 408; heavy train north of Spiro.
Aug.	5.	1	15	Taking fuel oil at Mena; picking up car at Spiro; engine not steaming properly between Bunch and Stilwell; picking up cars at Westville.
	12.	..	50	Working on engine at Mena; hot driving box at Thomasville; picking up car at Spiro; soft track between Sallisaw and Stilwell.
	16.	...	40	Repairing brake beam on engine 405; express and baggage at Spiro; mile 262; engine on freight train ahead running for water.
	28.	3	40	Derailment of train extra; engine 323, near Lemon, Texas, express and baggage at Spiro.
	29.	..	45	Meeting trains; express and baggage; picking up extra cars.
Sept.	1.	1	5	Taking fuel oil and working on engine at Mena; brick coming down in fire box; slow orders between Stilwell and Mena.

Mail Trains Arriving at End of Route 30 Minutes or More Late.—Continued.

Date.	Delays. Hrs.	Delays. Min.	Cause of delay.
Sept. 11.	..	30	Hot box on engine at Howe; saw by freight trains at Shady Point; working on headlight at Redland; headlight out Redland to Stilwell.
16.	9	35	Derailment on mile 290.
18.	2	17	Oil leaking out of tank at Marble City; engine sent from Stillwell to handle train; meeting train at Lyons; heavy train.
24.	1	30	Express and baggage, Howe and Heavenner; Spiro, derailment of train #7; meet train at Redland.
28.	5	15	Derailment of train extra, engine 335, Rosepine.

—, W. Coughlin, principal transportation officer of the Kansas City Southern Railway Company, hereby certify that the foregoing statement is true to the best of my knowledge and belief.

Name: W. COUGHLIN,
Title: *General Manager.*

Subscribed and sworn to before me this 19th day of November, 1906.

[SEAL.] CLARENCE R. HALL.

22 Thereon the Postmaster General issued an order as follows and notified the company thereof:

I hereby certify and approve the following orders and regulations, originating claims and affecting the accounts of the Post Office Department and Postal Service, in the following divisions and bureaus:

* * * * * * *

Second Assistant Postmaster General: Entire bureau. January 5, 1907.

* * * * * * *

GEO. B. CORTELYOU,
Postmaster General.

* * * * * * *

Ordered, that fines be imposed on contractors and deductions be made from their pay in the following cases, for Saturday, the 5th day of January, 1907. The right is reserved to make disallowances

from future payments for other failures or delinquencies, if any have occurred, and to correct errors and omissions.

* * * * * * *

Number of order, C 1332; number of route, 153,011; termini of route, Siloam Springs; State, I. T.; contractor's name, K. C. S. Ry. Co.; annual compensation, $78,454.49. Case A. Port Arthur.

Half trip.	Place, nature, and date of delinquency.	Amount. Fine.	Amount. Deductions.
59 04 Tr. 1 60 18 Tr. 3 51 22 Tr. 4	For late arrivals: Port Arthur, tr. 1, July 4, 5, 14, 19, 22, 24, Aug. 4, 5, 9, 10, 16, 18, 20, 21, 23, 24, Sept. 8, 17, 20, (19 delays); tr. 3, July 1, 2, 3, 4, 5, 6, 13, 19, 21, 22, 24, 28, 29, 30, Aug. 2, 4, 11, 22, 27, 28, 31, Sept. 1, 2, 3, 6, 7, 10, 27, 30 (29 delays); Siloam Springs, tr. 4, July 1, 2, 4, 6, 23, 25, 28, 30, Aug. 5, 12, 16, 28, 29, Sept. 1, 11, 16, 18, 24, 28, 1906 (19)—20%.	..	$768.03

23 Claimant from time to time rendered to the Postmaster General like statements of failures and detentions on the various other mail routes, as appear in the foregoing statement for the times named in the petition, upon which the Postmaster General issued the other orders of like character and for like failures and detentions. The aggregate of such deductions was $3,355.48.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed on authority of the case of Louisville & Nashville Railroad Company, 53 C. Cls. —.

V. *Opinion of the Court, by Booth, J., Entered in the Case of Louisville & Nashville R. R. Co. (53 C. Cls., —), Above Referred To.*

Filed Feb. 25, 1918.

Opinion.

Booth, *Judge,* delivered the opinion of the court:

The record in this case affords no opportunity for an issue of fact. The evidence is made up of official reports from the Post Office Department and clearly discloses the exact situation.

The claimant company on July 1, 1903 and 1904, entered into contracts with the defendants to transport the mails of the United States over its lines of railway. The service contracted for is carefully arranged by the department and stated officially as the establishment of mail routes, designated in each instance by number. The contracts covering the service consist not of a formally written paper but are concluded by pursuing two distinct steps, viz: The mailing by the department to the company of what is technically termed "a distance circular." This paper, forwarded prior to the readjustment period, calls for information as to the distance between stations, etc., on the railroad company's line. Aside from eliciting information upon which, under section 4002, Revised Statutes, the department fixes the compensation to be paid for the services, it contains the following clause:

"In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railroad company agrees to accept and perform the services upon the conditions prescribed by law and the regulations of the department."

24 If the mail route is established, the second and final movement of the department is the mailing to the railroad company of a written order of authorization, which, among other things, expressly states: "This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than six round trips per week." If thereafter the railroad company transports the mails, the contract is complete and the terms prescribed. Under section 4002, Revised Statutes, these readjustments occur every four years and the contract is coextensive with this period of time.

On the dates mentioned in the preceding contracts there was in full force and effect section 3962, Revised Statutes, as follows:

"The Postmaster General may make deductions from the pay of contractors for failure to perform service according to contract and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier."

On October 2, 1905, the department promulgated the following regulation:

"On account of the inferior service resulting from failure to observe the schedule on routes, or parts of routes, on which railroad mail service is not more frequent than seven times a week each way, it is ordered that in certifying to the performance of the service on such routes for, and subsequent to, the quarter ended December 31, 1905, deductions be made at the rate of twenty (20) per cent of the value of each train that arrives at the termini or junction fifteen (15) or more minutes late, and the aggregate number of late arrivals is ten (10) or more, without satisfactory excuse, in any one quarter, except that no deduction of less than one dollar ($1) will be made."

On June 26, 1906, the Congress passed the following statute:

"The Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to

time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay, when such delay is not caused by unavoidable accidents or conditions." 34 Stat. L., pp. 467, 472.

Subsequent to the passage of the foregoing enactment the Post Office Department promulgated a series of rules and regulations covering in minute detail the subject of deductions which would thereafter be made from railway transportation pay for failures upon the part of the company to observe its train schedule. As fully appears from Finding V, the claimant company suffered under the regulations for the various remissions shown, a total deduction in this respect of $10,020.40. It is for the recovery of this amount that this suit is brought.

The case presents a dual aspect. It is first sedulously contended that the quadrenniel contracts do not in terms nor by legal implication obligate the railroad company to transport the mails in accord with its train schedule, or, in other words, its time tables. Second, there being no Postal Laws or Regulations nor statutes of the United States in force at the time the contracts were made authorizing the Postmaster General to make deductions for the failure to observe train schedules, Congress could not, during the continuance of the contract period, as it attempted to do by the passage of the act of June 26, 1906, confer the claimed power and authority upon the head of the department; the contract could not be disturbed by legislation prior to its expiration. The settlement of one necessarily concludes the other. We deem it unnecessary to discuss both.

It has long since been settled that the distance circular, authorization order, statutes of the United States, Postal Laws and Regulations, as well as the practices of the Post Office Department, evidence the contract between the parties for the carriage of the mails, wherever the company performs the service. Eastern Railroad Co. v. United States, 129 U. S., 391; Parker v. United States, 26 C. Cls., 344.

25 In view of the adjudicated cases respecting the issue raised it is obvious that some power and authority was reserved by the terms of the contracts themselves to the Postmaster General to impose fines and make deductions. The reservation of the authority is not questioned in the claimant's brief; its extent only is challenged. It is true that except for the year 1879-1880 the Postmaster General has not made deductions from the railroads' compensation for transporting the mails for mere failure to maintain schedules; nor is it possible to identify an express regulation of the department covering the question prior to the one promulgated October 2, 1905, the department contenting itself with deductions for failures to complete a trip or a part thereof. Can it be said, however, that the mere failure to act, no matter if prolonged, destroyed the existing authority to act? If the authority vested in the Postmaster General under the law, which was concededly part of the contract of carriage, to make the deductions complained of, it is elementary that a mere failure to exercise the same did not abrogate it.

Section 3962, Revised Statutes, is general as to the extent of au-

thority reserved to the defendants respecting mail contracts and other delinquencies, while the amount of deductions for failure to complete a trip or trips is limited and circumscribed as to cause. There is nothing in the language of the statute which evidences a legislative intent to curtail the authority of the Postmaster General in other respects. Surely it can not be said, in view of the nature of the service to be performed, the absolute necessity for frequency and speed as set forth in section 4002, Revised Statutes, that Congress was expressly recognizing but one failure in the stipulated service as of sufficient importance to warrant the imposition of fines or the making of deductions. On the contrary, the act employs comprehensive terms—"may make deductions from the pay of contractors for failure to perform service according to contract and impose fines upon them for other delinquencies." This express reservation would be idle and meaningless if limited in scope and meaning to what follows in the act. The Congress by the statute was aware of the innumerable contingencies possible to arise in the transportation of the mails by rail which might embarrass and impede the administration of the Postal Service and wisely vested in the chief administrative officer of the department a discretion as to fines and deductions upon the happening of events other than those mentioned in the last paragraph of the act. As was said by this court in the Parker case, supra:

"The vast area of the post office system, its complexity of routes, the remoteness and distance of its operations from the seat of Government, require that a summary method of dealing with its innumerable contractors and sub-contractors shall exist, though its administration may involve instances of individual injustice."

A railway company offering its services to the Government for the transportation of its mails, under the terms and conditions of existing law, offers its complete facilities for the same. The worth as well as the volume of business given the various roads is predicated in a large measure upon its trip and station schedule, especially so as to competing lines. Time is most generally the very essence of railroad transportation, and it is difficult to perceive upon what hypothesis a company should be immune from observing this feature of the contract as to important intermediate stations on a railway postal route and suffer deductions for failure to traverse the entire route according to schedule. There may be instances when the exception claimed is fraught with infinitely more injury to the Postal Service than the failure for which penalties have uniformly been imposed.

It seems to us that the Post Office Department, in entering into contracts for the transportation of the mails, is not, under the necessary terms and conditions of the contract, to be precluded from asserting its right to have said mails transported according to the customary and published time cards of the company; that the performance of the service in this respect is a very vital and im-
26 portant facility of a corporation engaged in the transportation
of mails, otherwise the railway company may choose its own
time. A rural community with but one mail each day is seriously

inconvenienced with an habitual delay in its delivery. The public adapt themselves to the station schedule of the railroad; and, again, quoting from the Parker case, "the failure to perform as he has agreed to causes a public inconvenience, the value of which can not be proved in dollars and cents or estimated by courts and juries."

The first paragraph of section 4002, Revised Statutes, provides in part as follows: "First. The mails shall be conveyed with due frequency and speed." What reference other than to publish- time tables can the terms "due frequency and speed" have? Where is the fact as to this mandatory provision of the law to be ascertained? From what source other than train schedules? Speed and frequency permeate the whole undertaking; it is part and parcel of the facilities which the railway company has to sell, and, indeed, to the most profitable mail routes, the chief inducement for the contract of transportation. The Postmaster General believed that under the contract he possessed authority to make the claimed deductions, for, on October 2, 1905, he initiated a plan for carrying it into effect. It is true the regulations limited the deductions to specified routes, but this alone did not affect the paramount right. There has never been any doubt as to the existence of the power or that under the contract, laws of the United States, and regulations of the department it was of sufficient breadth to cover every detail of the service, obviously embraced in the very act of carrying the mails by the railroads of the country.

The railroad company accepted the readjustment contract with all the general provisions as to fines and deductions in full force and effect. It knew they became part of the undertaking and thereby assumed the obligation of carrying the mails in the way and under the scheme usually and customarily adopted by railroads in the operation of their train service.

It has been often held that the failure to complete a trip or a part of the trip incurs deductions from the compensation earned for that particular trip, cases quite too famliar have sustained the power, and while the issue as to station schedules has not heretofore been before the courts, the reason for its absence is due to the fact that not heretofore has the Postmaster General exercised his authority. It was not until the subject became acute he deemed it necessary to act.

The act of June 26, 1906, supra, confirms this contention. This statute was not legislation conferring a power or authorizing an act. It was in effect a mandatory direction to the Postmaster General to do what he already had the right to do, a limitation of his discretion under section 3962 of the Revised Statutes. "The Postmaster General was authorized to do under section 3962 what he was obliged to do under the act of June 26, 1906." This, we think, is a sufficient answer to claimant's second contention. Jacksonville, Pensacola & Mobile R. R. Co. v. United States, 118 U. S., 626; Chicago, Milwaukee & St. Paul R. R. Co. v. United States, 127 U. S., 406; Minneapolis & St. Louis Ry. Co. v. United States, 24 C. Cls., 350.

The claimant company, as shown by the record, acquiesced in the deductions made, accepted the reduced compensation paid without

protest or objection. except in one particular instance, and the item complained of was adjusted by the department to its satisfaction. No complaint is made as to the reasonableness of the deductions involved or as to the conduct of the department in any respect, except as to its legality.

In our view of the case the petition must be, and the same is hereby, dismissed. It is so ordered.

Hay, Judge; Downey, Judge; Barney, Judge; and Campbell, Chief Justice, concur.

27 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Fourth day of March, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Kansas City Southern Railway Company, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States; and that its petition be and it hereby is dismissed, on the authority of the case of the Louisville and Nashville Railroad Company, (53 C. Cls., R., —).

By The COURT.

28 VII. *Proceedings Had After Entry of Judgment.*

On May 3, 1918 the claimant filed a motion to amend the findings of fact and for a new trial.

On June 5, 1918, on motion made in open court by Mr. Alexander Britton therefor, it was ordered that the claimant's motion to amend the findings of fact and for a new trial, filed May 3, 1918, be withdrawn.

VIII. *Claimant's Application for, and Allowance of, an Appeal.*

Comes now the Kansas City Southern Railway Company petitioner, in the above entitled cause, and by counsel prays the Court to grant an appeal to the Supreme Court of the United States from the decision and judgment of the Court of Claims in favor of the United States, dismissing said petition.

BRITTON & GRAY,
Attorneys for Petitioner.

Filed June 5, 1918.

Ordered that the above appeal be allowed as prayed for.

By The COURT.

June 5, 1918.

29 In the Court of Claims.

No. 31973.

KANSAS CITY SOUTHERN RAILWAY COMPANY

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law entered by the court; of the opinion of the court by Booth, J., entered in the case of Louisville & Nashville R. R. Co., (53 C. Cls., R. —); of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City, this Tenth day of June, A. D. 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,622. Court of Claims. Term No. 536. Kansas City Southern Railway Company, appellant, vs. the United States. Filed June 27th, 1918. File No. 26,622.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 154.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

ALEX. BRITTON,
EVANS BROWNE,
Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

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No. 154.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
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vs.

THE UNITED STATES, APPELLEE.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Assignment of Errors.

(1) The Court of Claims erred in dismissing the petition.

(2) The Court of Claims erred in not rendering judgment for claimant.

(3) Upon the facts found, the Court erred as a matter of law in dismissing the Petition.

Statement of Case.

We have assigned the errors of the Court of Claims first, because to state the case clearly is to argue it.

The petition in this case was dismissed by the Court of Claims upon the authority of its opinion in case No. 31,610, Louisville and Nashville Railroad Company, and the opinion in that case is to be taken as filed in this case. The two cases were tried at the same time, but to save the time of this court only one of them has been brought before it on appeal.

The findings of fact show contracts between the Kansas City Southern Railway Company and the United States under which the company agreed to carry the mails of the United States over Mail Route 149027, between De Quincy and Lake Charles, Louisiana; Route 153011, between Siloam Springs, Arkansas, and Port Arthur, Texas, and Route 155054, between Kansas City and Siloam Springs, during the four years ending June 30, 1910,

> "Upon the conditions prescribed by law, and the "regulations of the Department applicable to railroad "mail service."

In fixing the amount to be paid the company for such service, the Postmaster General made three orders during September, 1906, which (with differences in rates and destinations) provided:

> "From July 1, 1906, to June 30, 1910, pay the "Kansas City Southern Railway Company, quarterly, "for the transportation of mails between De Quincy "and Lake Charles, Louisiana, at the rate of $1,677.21 "per annum, being $73.33 for 22.81 miles. This "adjustment is subject to future orders and to fines "and deductions, *and is based on a service of not less "than six round trips per week.*"

Notwithstanding the company carried over its several mail routes all mail matter tendered it and performed not less than six round trips per week, the Postmaster General, arbitrarily and without authority of law, deducted from the company's pay $3,355.48, solely because certain trains of the company did not arrive at their destinations on the time fixed by the company's published schedule of departure and arrival of its trains.

This suit was brought to recover such deductions upon the ground that at no time during the performance of its contract was it under any obligation to make schedule time, and hence the Postmaster General had no authority to withhold moneys earned.

The Court of Claims finding the facts as above stated, held the Postmaster General had discretionary power under section 3962, Revised Statutes, to make such deductions.

Section 3962 R. S. provides:

> "The Postmaster General may make deductions "from the pay of contractors for failure to perform "service *according to contract* and impose fines upon "them for other delinquencies. He may deduct the "price of the trip in all cases where the trip is not "performed and not exceeding three times the price "if failure be occasioned by the fault of the Con-"tractor."

It will sufficiently appear from the above that this company contracted to carry the mail between certain points not less often than six times per week and upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service.

The conditions prescribed by law were:

1st. That the mails shall be conveyed with due frequency and speed, and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and

warmed, shall be provided for (railway postal clerks) to accompany and distribute the mail.

2nd. That the pay per mile per annum should be at certain rates, based upon the weight of mail carried; the average weight to be ascertained by weighings as prescribed by law.

See section 4002, Revised Statutes, as amended by the acts of July 12, 1876, and June 17, 1878 (19 Stat. L., 79, and 20 Stat. L., 142.)

There were no conditions prescribed by the regulations of the Post Office Department imposing any other or different conditions material to this case, beyond the reserved right of the Department to decide upon what trains and in what manner the mails should be conveyed.

Section 1181, Postal Regulations 1902.

In the exercise of the discretion vested in him, as limited by law, the Postmaster General caused the mail to be weighed over routes 149027, 153011, and 155054, and fixed the annual compensation to be paid claimant for four years from June 30, 1906, "based upon a service of not less than six round trips per week."

There is no question, so far as this case is concerned, that the claimant performed a service of not less than six round trips per week and carried mail upon all trains designated by the Postmaster General. The amount now sued for is for deductions made from the claimant's pay because some of its mail-carrying trains did not reach their destination on schedule time.

ARGUMENT.

It is a well-settled and understood proposition of law that—

> "The announcement of schedules for the arrival "and departure of trains does not give rise to a con- "tract that as to a particular train the schedule will "be complied with, the liability for not complying

> "being one based on negligence in the proper opera-
> "tion of the train in connection with the business of
> "the carrier."
>
> 6 Cyc., p. 587.

No carrier ever has contracted, or ever will contract, to run its trains on schedule time, and it is both unreasonable and unlawful to read into the contract here in question any such condition. The claimant did undertake to carry the mail over its various routes not less frequently than six round trips per week, and the United States agreed, in consideration of such service, to pay the company a certain sum of money. The company performed the service, but instead of paying the amount agreed upon and fixed by law the Postmaster General deducted the amount here sued for solely because the company did not run its trains on schedule time, a condition not covered by the contract.

So far as appears from the findings, for the 33 years following the act of March 3, 1873, conditioning the right of the railroads to payment at the rates therein provided upon their conveying the mails with due frequency and speed, no attempt had been made by the Postmaster General, by regulation or otherwise, to make deductions for mere late arrivals of trains.

In the Post Office appropriation act for the fiscal year ending June 30, 1907, approved June 26, 1906 (34 Stats. L., Ch. 3546, pp. 467, 472–3), the following was enacted:

> "That the Postmaster General shall require all "railroads carrying the mails under contract *to com- "ply with the terms of said contract as to time of "arrival and departure of said mails,* and it shall be "his duty to impose and collect reasonable fines for "delay when such delay is not caused by unavoidable "accidents or conditions." (Italics ours.)

Previous to this act, the law governing the Postmaster General's action in cases of failures and delinquencies was

found in section 3962, Revised Statutes, carried as section 1332 of the Postal Laws and Regulations, edition of 1902, and set out in finding III, as follows:

> "The Postmaster General may make deductions "from the pay of contractors for failures to perform "service *according to contract,* and impose fines upon "them for other delinquencies. He may deduct the "price of the trip in all cases where the trip is not "performed; and not exceeding three times the price "if the failure be occasioned by the fault of the con-"tractor." (Italics ours.)

It is plain enough that under the provision in the act of 1906 by its own terms, a condition precedent to the imposition and collection of fines is that the company should be under contract to maintain its schedules, and that where there was no such contract there was nothing for the statute to operate upon.

So far as section 3962, Revised Statutes, is concerned, we see also that the pay was not subject to diminution except for two reasons and in two ways—deductions for failure to perform service according to contract, and fines for delinquencies—so it is evident also from this statute that unless the company was under contract to operate its trains on their schedule time, it was not subject to deductions for failure to do so, nor was it subject to fine as for delinquency, for the reason that no one can be delinquent for failing to do what he is under no obligation to do.

The foregoing recites all the statute law in connection with the subject. It goes to show that Congress realized the railroads would know it was to their interest to operate their trains on time, and were no more liable to the Government than to private individuals for their failure to do so. There is scarcely a living person who can remember a railroad timetable which did not plainly specify that the operation of trains in accordance therewith could not be guaranteed.

Obviously, the administrative regulations framed by the Postmaster General must be within the law, and it will be interesting to analyze these regulations for the purpose of seeing if the failure to make train schedule time was ever considered within the purview of the statutes providing for deductions or fines. If not, there is no usage, custom, or long-continued departmental construction for appellant to combat. On the contrary, the failure of the regulations to provide for deductions in such cases would reinforce our contentions.

We respectfully submit that, while the Postmaster General did, in October, 1905 (Tr., p. 6), issue an order proposing to make deductions for late arrivals on routes only where the service was not more frequent than seven times a week each way, it can have no effect in this case, for the reason that even limited as it was, it would not have been in operation long enough to give it a standing, either by acquiescence or otherwise, as a departmental construction of the law, which on its face it did not even purport to be, and for the further reasons, first, that it was illegal, and, second, that the departmental regulations, which are set out in Finding III, specifically protect the railroads against any such deductions.

II.

We might rest the case with the admission in the opinion that, other than the order of October, 1905, there was no regulation bearing on the subject, but we propose to show that not only do these regulations fail to provide for such deductions, but also that they specifically provide otherwise.

Section 1330, Postal Laws and Regulations, edition of 1902, provides for affidavits from railroad companies for *failures* of trains carrying the mails, and indicates that the Department was not interested in delays to ordinary trains, but only, and occasionally at that, in delays to tra'ns re-

garded as being of special importance as mail trains—that is, trains under contract to make their schedules and generally subsidized by Congress, as shown by the testimony of Mr. Stewart, Second Assistant Postmaster General, *intra.* Next, by section 1334, paragraph 1, it is provided that deductions are to be made according to the nature and frequency of the *failure* and the importance of the mail. Now, what was "failure"? It is defined by paragraph 4 of this regulation 1334, where it is said:

> "A train will be considered as failing to perform "service when it becomes 24 hours or more late, and "will be charged with failure from the point where it "becomes 24 hours late to the end of this run, *or to "the point at which* it becomes less than 24 hours "late." (Italics ours.)

In other words, no deduction would be made except for a failure of service, and there would be no failure if the train was operated at all that day. If there was any doubt about this, paragraph 5 of the same regulation resolves it in favor of our contention, ~~but~~ by providing that if another train should be made up and cover the failing train's run within the 24-hour limit, such service would be credited in lieu of the train which had broken down. Paragraph 12 further elucidates the differences in failure to perform "according to contract" by providing for deductions for failure to arrive at the time fixed by their schedules of trains regarded as special importance, with respect to which the opinion of the Court of Claims, saying, "It is true the regulations limited the deductions to specified routes,"—meaning specified trains—expressed its appreciation of both the difference and the limitation.

All these regulations clearly show the meaning of section 1186, Postal Laws and Regulations of 1902, paragraph 3, under which it has never been thought that the Postmaster General could dictate to a railroad the speed at which it should

operate its trains, or reduce its pay for its failure to live up to its own expectations in that respect. The requirements of frequency and speed were met if the railroad company provided the Department as good service as it provided its other patrons, it being understood that this should consist of a service of not less than six round trips a week. This suit does not claim anything whatsoever that may have been deducted from appellant's pay for any failure that may have occurred to render that service.

That this rendition of a service of not less than six round trips a week was and is the limit of the absolute obligation of the railroads is recognized by the Court of Claims itself in the case of the Texas & Pacific Railway Company *vs.* The United States, No. 31,550, decided March 25, 1918, on findings of fact without an opinion. The question there was whether the Postmaster General had right to make deductions from the transportation pay of the claimant for absolute failure of trains due to flood conditions, the company nevertheless maintaining a service of not less than six round trips a week. The court found the facts to be that the annulment of the failing trains did not reduce the service below six round trips per week and gave judgment for the claimant for the deductions made from its pay. In other words, the court in that case said in effect that the Postmaster General was not authorized to make deductions under the law and the contract for absolute failures of trains provided a service of not less than six round trips per week was maintained, while in this case it says the Postmaster General was authorized by the same statutes and the same contract to make deductions for mere lateness of trains, even if a service of many times six round trips a week was maintained.

In its opinion, the court says, "it is true that except for the year 1879-1880, the Postmaster General has not made deductions from the railroad's compensation for transporting the mails for mere failure to maintain schedules." The inference is that the Postmaster General did, at said time,

make such deductions on the authority of section 3962, but it will be noticed that there is no finding of fact to that effect. If the Postmaster General did, in 1879-1880, make such deductions, it was in the enforcement of an entirely independent statute, since repealed, viz., the act approved March 3, 1879 (ch. 259, 1 Supp. Rev. Stat., 453), section 5 of which was as follows:

> "That the Postmaster General shall deduct from "the pay of railroad companies, *for every failure to "deliver a mail* within its schedule time, not less than "one-half of the price of the trip, and where the trip "is not performed, not less than the price of one trip, "and not exceeding, in either case, the price of three "trips." (Italics ours.)

This law was expressly repealed by the act of June 11, 1880 (chap. 206, I Supp. Rev. Stat., 549), leaving the law as it was before, and as it has remained ever since.

The short-lived act of 1879 introduced an entirely new ground for making deductions, viz: the failure to deliver a mail within its schedule time. Its repeal carried that direction with it, and sustains our theory that there was not before, and has not been since, any law for deductions of the kind complained of in this suit.

That we are clearly right, so far as the testimony of a witness can demonstrate us to be, is shown by the testimony of Mr. Joseph Stewart, Second Assistant Postmaster General, *under oath,* before the Joint Committee of Congress on Compensation for the Transportation of Mail, on January 28, 1913, when the following occurred:

> "SENATOR BANKHEAD: What amount of penalty "does the Postoffice Department receive annually "from what is known as a failure to deliver the mail "on schedule time? Haven't you a penalty attached "for that failure?
>
> "MR. STEWART: No, sir; not at this time.
>
> "SENATOR BANKHEAD: You used to have?

"MR. STEWART: We used to have, by special di-
"rection of Congress, and that was carried, I think,
"for two years, and we assessed fines against the rail-
"road company for failure to keep their schedule
"time.

"SENATOR BANKHEAD: I know that was in prac-
"tice at one time not very long ago.

"MR. STEWART: Yes, but that was discontinued for
"this reason—that all the fines we would assess for
"this purpose did not accomplish anything in the
"way of improving their schedules. It simply caused
"irritation, and took the money of the road instead
"of allowing it to go toward improved service.

"SENATOR BANKHEAD: I supposed the same rule
"was in vogue now.

"MR. STEWART: No, upon our representation to
"Congress of those facts Congress dropped that out of
"the appropriation bill.

"SENATOR BANKHEAD: You spoke awhile ago of
"subsidizing trains from New York to New Orleans.
"You finally decided you did not want them any
"more, because it was an additional expense to them,
"and the additional pay they received would not
"justify them in the schedules they were required to
"make, and in the end all the additional pay they
"received was taken in fines, because they failed to
"make a schedule, and I think the Post Office Depart-
"ment made the schedules for them and said when
"they should leave and when they should arrive at a
"certain destination?

"MR. STEWART: Yes, in order to make connections
"we would have to do that. In the case of a train
"like that, if they did not make their schedule we
"would fine them.

"SENATOR BANKHEAD: Yes. That is what I had
"in mind."

(Vol. I of Hearings, pp. 19-20.)

Moreover, when the appropriation act for the following year—the act of March 2, 1907—was in the making, the contemporaneous Second Assistant Postmaster General, Mr. Shallenberger, Mr. Stewart's predecessor, made it clear to

the House Committee on Post Offices and Post Roads that the act of June 26, 1906, was something *entirely new*, when he said:

> "The law of the last session of Congress will have "the effect of reducing the railway mail pay unless "the railroad companies shall do what they have not "been doing of late in the direction of satisfactory "service. As you know, substantially all the railroads "have been burdened with an unprecedented traffic. "Complaints come from every section of the rountry "that schedules are not maintained. Congress has "taken note of that and last year adopted an amend-"ment to the bill which authorized and directed the "Postmaster General to impose fines and makes de-"ductions from the pay of railroad companies for "failure to observe schedules."
>
> ("Post Office Appropriation Bill, 1908—Hearings before Sub-committee No. 1 of the Committee on Post Offices and Post Roads, House of Representatives," pp. 145-'6.)

Of course, we do not contend that Mr. Stewart's sworn testimony and Mr. Shallenberger's confession settle the law. If we did, we would rest our case upon them. The Court of Claims holds that the act of June 26, 1906, added nothing to the existing law except that it made the application of the provisions of section 3962 mandatory on the Postmaster General. We agree with this. The Post Office Department experts swear that without the act of June 26, 1906, there was *no* penalty attached for the failure to maintain schedules. We also agree with this, but we point out that these acts, taken either separately or collectively do not authorize these deductions.

Paraphrasing an expression found in the Court of Claims opinion in the Jacksonville, Pensacola & Mobile case, 21 Ct. Cls., 155, 174, the court below says: "The Postmaster General was authorized to do under section 3962 what he was obliged to do under the act of June 26, 1906," and cites that

case and the cases of the Chicago, Milwaukee & St. Paul Ry. Co., 127 U. S., 406, and Minneapolis & St. Louis Ry. Co., 24 Ct. Cls., 350, as to the same effect as authority.

All these decisions are to the same effect, but that effect is not what the Court of Claims ascribes to them in the present case. A merely casual examination of the findings and opinions in the cases referred to shows conclusively that what the court was dealing with in those cases was the right of the Postmaster General to make deductions for absolute failures to operate trains and to deliver the mails on the days—that is, within 24 hours of the time scheduled. That is not the question we are litigating here. The cases are not, therefore, an authority in this case for deductions made for mere late arrivals within the day.

Finally, it may be pointed out from the instructions issued by the Postmaster General after [redacted] the act of 1906, he recognized the difference between "failures" and mere "late arrivals." (Finding IV, Trans., p. 9.)

These adjudications all, like the postal regulations, relate to the matter covered by section 3962 of the Revised Statutes, viz., the entire failure of mail trains to perform the services. It is true, that words were used somewhat loosely in the decisions of the Court of Claims, but nevertheless it is manifest in each of the cases that the subject of the fines complained of was omission to run the train and carry the mail on a day to which the railroad company was bound by its contract.

In Jacksonville, Pensacola & Mobile Railroad Co. *vs.* United States, 21 Ct. Cls., 155, the opinion says (p. 172) that the branch of the controversy referred to related to "non-delivery of mails on several occasions *upon the days* required by schedule time, although they were subsequently delivered" (italics ours), and on the same page, section 3962 is cited as the Department's warrant for the fines in question. The phrase, "upon days required by schedule time" was copied from the findings of fact (p. 164).

This decision shows quite conclusively that there had been no custom of making deductions for mere failure of a train, when making its usual trip, to reach all stations at the times fixed by the schedule. The Post Office appropriations act of March 3, 1879, contained a provision for fines in cases of train lateness, but that had been repealed by the act of June 11, 1880 (1st Supp. Rev. Stat., 549). The Court of Claims held that this legislation, having a different subject, in nowise affected section 3962 (pp. 172–173).

Chicago, Milwaukee & St. Paul Railway Co. *vs.* United States (No. 14438 in the Court of Claims) is not reported except by a syllabus and a copy of the syllabus of this court (127 U. S., 406). What this court had decided, as its head notes show, was that the act of June 11, 1880, had not repealed section 3962—this, and nothing more. This court, however, did say:

> "Section 3962 authorizes a deduction from the pay "of contractors, whether they be natural persons or "corporations, the price of the trip in all cases where "the trip is not performed, and not exceeding three "times the price if the failure be caused by the fault "of the contractor or carrier. Section 5 of the act of "1879 applies only to railroad companies, and has "special reference to failures of delivery within sched-"ule time, *and makes a difference between them and "failures to make the trips,* leaving the provision for "the latter substantially as it is in the Revised Stat-"utes." * * *
>
> "The most that can be said of section 5 of the act "of 1879, construed with reference to section 3962 of "the Revised Statutes, is that it makes an exception "to the provisions of that section, so far as railway "companies are concerned. Its repeal, therefore, "leaves the original section in full force."

This would seem to make it clear without examination of the record that the subject of the suit was fines imposed for

"failures to perform services," *i. e.,* the subject of section 3962, but naturally the record contains more of detail.

The case was heard upon demurrer to an amended petition. Following is the text of the paragraph in the petition which describes the omissions of service:

> "Your petitioner alleges that, between the autumn "of the year 1880 and the spring of the year 1883, "owing to snow blockades and floods, and other un-"avoidable causes, all of which it was impossible for "your petitioner to provide against, it was prevented "at various times running its trains of cars over the "said routes, and in consequence thereof the United "States mails were delayed and accumulated until "such times as your petitioner could run its cars over "the routes aforesaid."

To summarize, these decisions show:

(1) That for one year, 1879–1880, there was a law to impose fines for a mere failure of a train on any day to observe its schedule.

(2) That such law and the failures therein provided for were distinct from and in addition to the matter for which section 3962 provided.

(3) That the act of June 26, 1906 (34 Stat., 467), only applied to trains under contract to observe schedule time, and has no application to this case.

(4) That the act of March 2, 1907 (34 Stat., 1212), referred to in the petition, specifically required all contractors to maintain their regular train schedules as to time of arrival and departure; but the deductions involved in this case were made prior to the taking effect of this act and are not affected thereby.

The case in its final analysis comes to this:

There was no failure of service, the company performing service over each of its mail routes more than six round

trips per week and carrying from initial points to terminals all mail delivered to it by the United States within a few minutes or hours of the scheduled time. The company did not specifically contract, and no law or regulation required it, to carry the mail on schedule time.

The position of the Government under the laws and regulations is that a train which breaks down and has its mail carried through by another train any time within the 24-hour limit earns full compensation under the contract, whereas in this case it says that another train performing its own service and arriving at its destination thirty minutes late with the mail does not.

To merely state the proposition seems a sufficient answer.

We respectfully submit the judgment of the Court of Claims should be reversed, with instructions to enter judgment for the company in the sum of $3,355.48.

Respectfully submitted,

ALEX. BRITTON,
EVANS BROWNE,
Counsel for Appellant.

BRIEF FOR THE UNITED STATES

INDEX.

AUTHORITIES CITED.

THE STATUTES AND REGULATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

KANSAS CITY SOUTHERN RAILWAY Company, appellant, *v.* THE UNITED STATES.	No. 154.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This suit presents another one of the many questions which have arisen as to the amount of compensation to which a railroad company was entitled for carrying the mails under the law in force until the coming into effect of the act of July 28, 1916 (39 Stat. 412, 419). It was brought to recover from the United States the amount of fines claimed by appellant to have been illegally imposed upon it by the Postmaster General during the fiscal year ending June 30, 1907, because of its failure to run its trains over certain of its mail routes on schedule

time. The Court of Claims dismissed the petition on the authority of its decision in the case of *Louisville & Nashville Railroad Company* v. *United States,* 53 Ct. Cl. 238 (R. 17–22), and the railroad company appeals.

THE FACTS.

The four-year contracts under which the appellant had theretofore transported the United States mails over the routes here involved were about to expire on June 30, 1906. (R. 4.) On February 13 of that year the Postmaster General sent appellant the customary distance circulars for the routes in question calling for certain information upon the basis of which new four-year contracts might be entered into, and containing an agreement clause which provided that "the company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service." Appellant executed these agreement clauses and returned the circulars properly filled out to the Postmaster General. In due time the latter caused the mails transported over these routes to be weighed and issued orders of authorization stating the amount of compensation he would pay appellant for carrying the mails over the routes in question. Each order stated that:

> This adjustment is subject to future orders and to fines and deductions and is based on service of not less than six round trips per week. (R. 5.)

Among the Postal Laws and Regulations in force during all of the fiscal year ending June 30, 1907, and for many years prior thereto was Revised Statutes, section 3962, which provides as follows:

> The Postmaster General may make deductions from the pay of contractors for failures to perform service according to contract and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

Revised Statutes, section 4002, authorized the Postmaster General to readjust the compensation to be paid for the transportation of the mails on railroad routes on the condition, among others, that the mails should be conveyed with "due frequency and speed" and fixed the maximum compensation which the Postmaster General was authorized to pay.

There was also in force during the fiscal year ending June 30, 1907, the following provision of the act of June 26, 1906 (34 Stat. 467, 472):

> That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such delay is not caused by unavoidable accidents or conditions. (R. 7.)

For the purpose of making the above act effective the Postmaster General on August 3, 1906, issued Order No. 1131 which, after setting forth the provisions of the above act, provides that:

> Every railroad company operating a route over which mails are carried shall, on the regular affidavit covering failures of mail train service which it is required to submit promptly at the end of each quarter to the respective division superintendents, Railway Mail Service, show, in addition to and separate from such mail train failures, the number of minutes late of each arrival (not time of arrival) of every train carrying mail which has reached the terminus of such route, the terminus of such train's run, or any intermediate point designated by the Postmaster General and of which the company shall have notice, thirty or more minutes late as many as ten times during the quarter, the extent, cause in detail, and place of each delay being given. (R. 7.)

On August 13, 1906, a copy of this order, together with certain additional instructions in regard to it, was sent to the general manager of appellant by one of the division superintendents of the Railway Mail Service. (R. 8.)

Appellant in compliance with these instructions made quarterly returns showing the number of minutes late of each arrival of every mail train and the Postmaster General on the basis of these returns made deductions from the compensation paid appellant quarterly at the rate of 20 per cent of the

value of the delayed trains. (R. 11, 17.) Appellant, although it performed the service on the terms above stated without objection and accepted the compensation tendered it without protest against the deductions made, now seeks in this action to recover the amount thereof.

THE CONTENTIONS OF THE PARTIES.

Appellant does not dispute that if the Postmaster General had authority to impose fines on account of the failure of its mail trains to arrive on schedule time he exercised that power reasonably and properly in this case. It does not attempt to deny that a carrier has the power to enter into a contract binding it to maintain its train schedules. It merely denies that the Postmaster General had power to do so or that such a contract was in fact entered into. Its reasoning is somewhat elusive, but it seems to run something like this: Because a carrier does not ordinarily contract to run its trains on schedule time, "it is both unreasonable and unlawful to read into the contract here in question any such condition." (Appellant's Brief, p. 5.) The Postmaster General had never before attempted to enter into a contract requiring a carrier to maintain the train schedules which it from time to time adopts, and this fact showed the absence of his power to do so. Under Revised Statutes, section 3962, and the act of June 26, 1906, the Postmaster General had power to impose fines and make deductions from its compensation only in case it failed

to carry the mails according to contract. (Appellant's Brief, p. 6.) Since appellant had not contracted to maintain such train schedules, the Postmaster General had no power to make deductions from its pay because of its failure to do.

The Government, while recognizing that a carrier does not ordinarily contract to run its trains on schedule time, contends that the parties to a contract for the carriage of the United States mails have power so to contract if they wish; that they had done so on previous occasions and did so in the case under consideration, and that, therefore, the Postmaster General had the power both under Revised Statutes, Sections 3962 and 4002, and under the act of June 26, 1906, to impose fines for failure to run its mail trains on schedule time.

ARGUMENT.

I.

The Postmaster General Had Power to Enter Into A Contract With Appellant Whereby the Latter Was Bound to Maintain the Train Schedules Published by It From Time to Time.

The Postmaster General has from the very creation of his office been vested with the widest discretion in entering into contracts for the carriage of the mails. Such limitations as Congress has from time to time imposed upon him have been directed solely to the protection of the government from the results of imprudence on his part or extortion on the part of those with whom he must deal.

At the time of the transactions here involved the only limitations imposed upon his discretion were those contained in Revised Statutes, section 4002, and the statutes amendatory thereof, namely, that he should not agree to pay compensation at rates exceeding certain fixed maxima which were graded according to the average weight per day of the mails carried, to be ascertained in a manner authorized by the statute. While Revised Statutes, section 4002, directed the Postmaster General in adjusting the compensation to consider certain conditions, among which was that the mails should be conveyed with due frequency and speed, it left to his discretion the determination of what is "due frequency and speed," as well as the means of enforcing this condition.

The Postmaster General was not obliged to agree in any case to pay the railroads the maximum compensation. Within the maximum fixed by statute he had power to fix the rate of compensation allowed as well as to prescribe the quality of the services to be rendered. The regular carriage of the mails according to a fixed schedule is a more valuable service than an irregular carriage subject to frequent delays and departure from the schedule. The Postmaster General could refuse to enter into a contract whereby any railroad company was to receive the full compensation allowed by him under the statute, unless the company agreed to maintain the train schedules published by it from time to time. The power to do so

was neither expressly nor impliedly withheld. It clearly was within the wide discretionary powers vested in him. He also had the right to declare that he would pay a higher rate of compensation for those routes over which train schedules were maintained with reasonable regularity than those over which they were not so maintained. To make a difference in the rate of compensation paid the railroads based upon regularity of the service would not be an abuse of his discretion. It would be a reasonable method of insuring the transportation of the mails with due frequency and speed.

Appellant erroneously assumes that the Postmaster General's power to make the deductions which he made in this case must be derived from sections 3962 or the act of June 26, 1906. The purpose of section 3962 was to empower the Postmaster General to make deductions for infractions of contract where the contract did not itself expressly stipulate what the consequence of such infractions should be. It need not be resorted to to demonstrate the power of the Postmaster General to provide by contract what shall be the consequence of the failure of a carrier to maintain train schedules which it had agreed to maintain. That power is derived from Revised Statutes, section 4002.

One of the questions decided in *Jacksonville, Pensacola & Mobile Railroad Company* v. *United States,* 21 Ct. Cl. 155, was as to the right of the Postmaster General to make deductions from the compensation fixed by law and the orders of the

department for nondelivery of mail on the days required by schedule time although they were subsequently delivered. The court after deciding that such deductions were authorized by Revised Statutes, section 3962, and that the latter had not been repealed by section 5 of the act of March 3, 1879, said (p. 174):

> But there is another view of this branch of the case, independent of these statutes. * * * The maximum compensation authorized by statute and the amount allowed thereunder by the Postmaster General are for the whole service expected of such railroad companies according to schedule time and other regulations of the department. For any failure on the part of a railroad company to perform the entire service and to carry the mails in accordance with the standing order and regulations of the department, the Postmaster General had the right, and it was his duty, to withhold and deduct from the authorized compensation a reasonable amount as damages for such failure. That was all he did in this case.

Appellant concedes that the power of the Postmaster General to make deductions in case a train is delayed twenty-four hours or more is established beyond dispute, but contends that a different principle applies where a train is less than twenty-four hours late. It says that the delay of a train for twenty-four hours or more was treated under the regulations of the Post Office Department as a failure to perform service according to contract;

that under Revised Statutes, section 3962, the Postmaster General has authority to make deductions only for failure to perform service; that there is no failure to perform service where the railroad company makes six or more round trips per week.

Clearly the last of these assertions is unsound and with it falls the entire argument. The second sentence of section 3962 applies to the case of a total failure to complete at any time a trip which the carrier has contracted to make, but it does not limit the power which the Postmaster General has under Revised Statutes, section 4002, and the first sentence of section 3962 to make deductions for other failures to perform service. It merely limits the amount the Postmaster General may deduct for that particular failure.

Appellant fails to point out any difference in principle between the failure of a train to arrive within one-half hour of schedule time and its failure to arrive within twenty-four hours. The power to make deductions in the latter case is nowhere expressly granted. If the Postmaster General may consider the failure to arrive within twenty-four hours of schedule time as a failure to perform service and enter into a contract with the carrier on that basis, why may he not also consider the failure to arrive within one-half hour of schedule time as a failure to perform service? In either case the power must be derived from Revised Statutes, section 4002, and the powers conferred by that section

are broad enough to sustain deductions where a train is less, as well as where it is more, than twenty-four hours late. The failure of the courts in a number of cases to distinguish clearly between the two shows that they had no such distinction in mind and that it does not in fact exist.

That the distinction appellant seeks to make does not exist is also proven by the fact that the Postmaster General actually did, prior to the act of June 26, 1906, make deductions in special cases for failure to observe train schedules. Postal Laws and Regulations, 1902 edition, provides in section 1330:

> Railroad companies must furnish quarterly, to the division superintendent of Railway Mail Service, statements on the form prescribed by the Post Office Department, and affirmed under oath of their respective principal transportation officers, showing by routes all failures of trains carrying the mail; also, when called upon to do so, railroad companies will be required to furnish monthly statements, certified as above, of all delays, and their causes, to trains which the department regards as being of special importance as mail trains. (R. 5.)

Section 1334, paragraph 12, provides:

> Trains which the department regards as being of special importance as mail trains will be subject to deductions for failure to arrive at junction and terminal points at the time fixed by schedule unless held for mail connections, or unless satisfactory explanation be given in due time. (R. 6.)

And on October 2, 1905, the following order was issued:

> On account of the inferior service resulting from failures to observe the schedule on routes, or parts of routes, on which railroad mail service is not more frequent than seven times a week each way, it is ordered that in certifying to the performance of the service on such routes for, and subsequent to, the quarter ending December 31, 1905, deductions be made at the rate of twenty (20) per cent of the value of each train that arrives at the termini or junction points fifteen (15), or more minutes late and the aggregate number of late arrivals if ten (10) or more, without satisfactory excuse, in any one quarter, except that no deduction of less than one dollar ($1) will be made. (R. 6.)

The requirement of section 1330 that railroad companies must furnish monthly statements of all delays and their causes to trains which were regarded by the department as being of special importance as mail trains, coupled with the provision of section 1334 that such trains would be subject to deductions for failure to arrive at junction and terminal points at the time fixed by schedule unless such failure was satisfactorily explained, was clearly an exercise of the Postmaster General's power to incorporate into the contracts of mail carriage the schedules of the trains to which these regulations applied. The same is true of the order of

October 2, 1905. By promulgating these regulations the Postmaster General notified the railway companies that so far as the trains affected thereby were concerned he would pay the maximum rates for mail carriage according to train schedule and a reduced rate of compensation if the roads failed to carry the mails according to schedule unless they could give a satisfactory excuse for such failure. That the Postmaster General had the power to do this has already been demonstrated.

II.

Under the Contract in Question the Appellant Agreed, in Carrying the Mails, to Maintain Its Train Schedules.

Since it is clear that the Postmaster General had power to enter into a contract with the appellant whereby the latter was bound to maintain the train schedules published by it from time to time, the only remaining question is whether he did so as a matter of fact. In view of the statutes and regulations in force at the time this contract was entered into it is obvious that this question must be answered in the affirmative.

We have just seen that prior to July 1, 1906, the Postmaster General had occasionally entered into contracts with railroads whereby they were required in special class of cases to maintain their train schedules. Whether and to what extent he should exercise his power to do so had been discretionary with him. But on that date the follow-

ing provision of the Act of June 26, 1906, went into effect:

> That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such delay is not caused by unavoidable accidents or conditions.

Clearly Congress intended by this act to make the exercise of the power of the Postmaster General to incorporate the train schedules into contracts for mail carriage mandatory in all cases. As was stated by the Court of Claims in its opinion in the case of *Louisville & Nashville Railway Co.* v. *United States,* followed by it in the case at bar, this statute was a mandatory direction to the Postmaster General to do what he already had the right to do.

In an opinion delivered December 3, 1908 (27 Op. 108), in which the Attorney General held that this provision and the similar one contained in the act of March 2, 1907, were applicable only to the appropriation periods covered by the acts of which they were a part, he said, page 109:

> The language employed in the first of these appropriation acts is "that the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract," while in the second it is declared "that the Post-

> master General shall require all railroads carrying the mails to maintain their regular train schedules"; the remaining words in both clauses being identical. Now, so far as the prompt arrival and departure of mails is concerned, there is no difference between requiring the railroads to keep their contracts and requiring them to maintain their regular train schedules. What the railroads contract to do is to carry the mails in accordance with the schedules fixed by them. * * *

He held, however, that the fact that these statutes were no longer in force did not affect the powers of the Postmaster General. Referring to Revised Statutes, section 3962, he said (p. 112):

> The only difference between this act and the provisions in the appropriation bills on the same subject is that under the permanent law the Postmaster General has power in his discretion to impose penalties for delays in carrying the mails, while under the temporary provisions he was required to impose such penalties.

Even if the construction put upon this statute by the appellant were correct, that it merely authorized the Postmaster General to impose fines for failure to run trains according to schedule in those cases in which the company was under contract to maintain its schedules, that would be immaterial, for, as a matter of fact, under the statutes the Postmaster General did exercise his power to incorpo-

rate the train schedules into the contract of carriage in every case by the promulgation of Order No. 1131, which provides that every railroad company operating a route over which mails are carried must report quarterly the number of minutes late of each arrival—

> of every train carrying mail which has reached the terminus of said route, the terminus of such train's run, or any intermediate point designated by the Postmaster General and of which the company shall have notice, thirty minutes or more late as many as ten times during the quarter.

The contracts under which appellant had been carrying the mails expired June 30, 1906. The statute of June 26, 1906, and Order No. 1131 were part of the terms on which the Postmaster General offered to enter into a new contract with appellant for the carriage of the mails. Both were known to the railroad company. They constituted a notification to it that it would not be entitled to the full compensation contracted for for carrying the United States mails unless it maintained its train schedules within the limits required by the order. By performing the service in accordance with these terms and accepting payment in the amount offered it, without protest against the deductions, it accepted the offer of the Postmaster General. *Minneapolis & St. Paul Railway Co.* v. *United States*, 24 Ct. Cl. 350; *Eastern Railroad Co.* v. *United States*, 129 U. S. 396. Both parties having power

to enter into a contract on these terms and having done so, there is no ground on which appellant can recover the amount of the deductions.

III.

The Deductions Were Justified Even If the Appellant Was Not Under Contract to Maintain Its Train Schedules.

The question whether the Postmaster General had power to make the deductions in question may, however, be viewed from another aspect. Under Revised Statutes, section 3962, the Postmaster General has power not merely to make deductions for failure to perform services according to contract but to impose fines upon them for "*other delinquencies*" which need not be breaches of contract.

Appellant admits that even if it was not under contract to maintain its train schedules it was liable for unreasonable delays in the arrival of its trains caused by its negligence. Such unreasonable delays, if caused by its negligence were, if not breaches of contract, at least delinquencies under Revised Statutes, section 3962. Unless the Postmaster General manifestly abuses or exceeds his power under that act to make deductions or impose fines his action is final and not subject to judicial review. (*Allman* v. *United States,* 131 U. S. 31; *Parker* v. *United States,* 26 Ct. Cl. 344). As a matter of fact no deductions were made under Order No. 1131 unless the delays were, in the judgment of the Postmaster General, caused by ap-

pellant's negligence, and that order furthermore evidenced the judgment of the Postmaster General that if a train was thirty or more minutes late ten times in one quarter, such delay was unreasonable.

The Postmaster General had power to make the deductions and it is not contended that he exercised the power arbitrarily or unreasonably. Therefore the appellant has no cause of complaint, even if it was not under a contract to maintain its train schedules.

CONCLUSION.

The only question in dispute in this case is as to the Postmaster General's power to make the deductions in question, and as that power is clear in any aspect of the case, appellant has no cause of complaint. It follows that the decree of the Court of Claims dismissing the petition was correct and should be affirmed.

Respectfully,

THOMAS J. SPELLACY,
Assistant Attorney General.

LEONARD B. ZEISLER,
CHARLES H. WESTON,
Special Assistants to the Attorney General.

O

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 154. Submitted January 19, 1920.—Decided March 1, 1920.

A railroad company which enters into a contract to carry the mails "upon the conditions prescribed by law," etc., is liable to fines or deductions from its compensation for failures to maintain its mail train schedules (Rev. Stats., §§ 3962, 4002; Act of June 26, 1906, c. 3546, 34 Stat. 472). P. 149.

The fact that the Post Office Department long abstained from making such deductions under Rev. Stats., § 3962, where delays were less than 24 hours, does not amount to construing that section as inapplicable to shorter delays. P. 150.

And in any event, the right to such a construction could not be claimed by a company whose contract was made soon after the Postmaster General had issued an order for deductions in future when trains arrived fifteen or more minutes late a designated number of times

per quarter, and soon after the approval of the Act of June 26, 1906, *supra*, directing him to impose and collect reasonable fines for failure of railroads to comply with their contracts respecting the times of arrival and departure of trains. P. 150.

53 Ct. Clms. 630, affirmed.

THE case is stated in the opinion.

Mr. Alex. Britton and *Mr. Evans Browne* for appellant.

Mr. Assistant Attorney General Spellacy, Mr. Leonard B. Zeisler and *Mr. Charles H. Weston*, Special Assistants to the Attorney General, for the United States.

Mr. Benjamin Carter, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellant, in its petition, alleges: That in June, 1906, it entered into contracts with the Post Office Department to transport the mails over three designated routes "upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service;" that during the fiscal year 1907 (the petition was not filed until December 19, 1912), the Department withheld from its stipulated pay $3355.48, "as a penalty imposed on account of late arrivals of . . . trains and failure to perform service on the . . . mail routes," and that such deductions were "unlawfully withheld." The prayer was for judgment for the full amount of the deductions,—which are also designated in the record as fines or penalties. The petition was dismissed by the Court of Claims.

The appellant acquiesced in the deductions when they were made, accepted the reduced compensation without protest or objection, except in one instance, when the item complained of was adjusted to its satisfaction, and continued to perform the contracts to the end of their

four-year periods without complaint as to the reasonableness of the deductions involved. And thus it comes admitting that it freely entered into the contracts, fully performed them and accepted pay for such performance, but asking judgment for deductions which it avers were "unlawfully withheld" more than five years before the petition was filed.

The contracts were of the type, familiar in many reported cases, evidenced by "distance circulars," orders establishing the routes, specific agreements on the part of the contractor that it would perform the service "upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service" and that the "adjustment" should be "subject to future orders, and to fines and deductions."

Among the applicable "conditions prescribed by law" were: Rev. Stats., § 3962, that the Postmaster General might "make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies"; Rev. Stats., § 4002, authorizing contracts for the conveyance of the mails "with due frequency and speed"; and the Act of June 26, 1906, c. 3546, 34 Stat. 467, 472, commanding the Postmaster General to require all railroads carrying mail to comply with the terms of their contracts "as to time of arrival and departure of said mails" and "to impose and collect reasonable fines for delay" when not caused by unavoidable accidents or conditions.

It is conceded by the appellant that the Postmaster General had authority under Rev. Stats., § 3962, to make deductions from the pay when a "trip was not performed" within twenty-four hours of the stipulated time for performance. But it is contended that he had no authority to make deductions or impose fines for shorter delays,—and this is the sole question upon which this appeal is pursued into this court.

It is argued for the appellant: That power to make the disputed deductions must be found, if at all, in the provision of Rev. Stats., § 3962, that the Postmaster General may "make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies"; that when the contracts were made, long departmental construction had limited the failure to perform service, described in the act, to twenty-four hours of delay in the arrival of trains; and that failure, from 1872, when the section was enacted, to 1907, to impose fines or deductions for shorter delays, amounted to a construction by the Department that authority to impose fines upon contractors for delinquencies did not warrant deductions for failure to maintain train schedules when the delay was less than twenty-four hours.

We need consider only this last contention, and in reply it is pointed out that the findings of fact show: that the amount and rates of compensation were determined by the Department for the various routes, between the 10th and 26th of September, 1906, though effective as of the first day of the preceding July; that in October, 1905, the Postmaster General, "on account of the . . . failures to observe the schedule on routes, or parts of routes," issued an order that deductions should be made, in sums stated, after December 31, 1905, when trains arrived at termini or junction points fifteen or more minutes late, a designated number of times in a quarter; and that the Act of Congress, approved June 26, 1906, referred to, declared it to be the duty of the Postmaster General to impose and collect reasonable fines for failure of railroads to comply with the terms of their contracts with respect to the time of arrival and departure of mails. This act was repealed in the following year, but the substance of it was immediately reënacted in a more adaptable form.

Thus, the appellant had notice before it made the con-

tracts under discussion that failure to maintain train schedules was regarded by Congress and the Department as a violation of mail-carrying contracts, justifying the imposition of fines or deductions, and that both believed there was authority under the customary contracts and the law to impose such deductions. The Act of June 26, 1906, was not a grant of new power to the Postmaster General to impose such fines or deductions, but was an imperative direction to him to exercise the power which, it assumes, he already had for that purpose.

This action of Congress and of the Department is sufficient answer to the claim, if it were otherwise sound, that failure to exercise the power to impose fines for such a cause amounted to a departmental declaration that no such power existed.

But the contention is not sound. Failure, within moderate limits, to maintain train schedules may well have been regarded by the Postmaster General as a necessary evil to be tolerated and not to call for the exercise of his power to impose fines under the statute, when more flagrant neglect to maintain such schedules might very justly require him to exercise such authority in order to prevent intolerable public inconvenience. We cannot doubt that the contracts of the appellant, and the law which was a part of them, furnished ample authority for the action of the Department in this case and that omission to exercise such power did not make against the proper use of it when, in the judgment of the Postmaster General, adequate occasion for its use should arise.

We need not pursue the subject further. The principles involved are adequately and admirably discussed by the Court of Claims in its opinion, rendered in the case of *Louisville & Nashville R. R. Co.* v. *United States*, 53 Ct. Clms. 238, upon authority of which this case was decided.

The judgment of the Court of Claims is

Affirmed.